

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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Appellate Case No. 2016-2339  
Case No. 2014-CP-08-2424

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Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,  
Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,  
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast IUI, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators, Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast

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Group, LLC, and Low Country Renovations and Siding LLP, Third Party Defendants, Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construct, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

And

Décor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Richardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1 – 4, Fourth-Party Defendants.

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**RESPONDENT DVS, INC.'S FINAL BRIEF**

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August 23, 2017  
Columbia, SC

S. Markey Stubbs (S.C. Bar # 7973)  
BAKER, RAVENEL & BENDER, L.L.P.  
3710 Landmark Drive, Suite 400  
Post Office Box 8057  
Columbia, South Carolina 29202  
Phone: (803) 799-9091; Fax: (803) 779-3423  
[mstubbs@brblegal.com](mailto:mstubbs@brblegal.com); File No. 7603.455  
*Attorneys for Respondent DVS, Inc.*

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## **STATEMENT OF THE CASE**

The owners filed this lawsuit against Lennar and others based upon alleged construction defects, Lennar asserted Cross-Claims against Co-Defendants and third-party claims against subcontractors.

Lennar subsequently filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court to issue an order compelling the owners to arbitrate pursuant to the purchase sale agreement, the Lennar warranty, the covenants, and the deeds. Lennar's Motion also requested the Circuit Court to compel Spring Grove Development to arbitrate pursuant to covenants and the subcontractors to arbitrate based upon their alleged individual contracts with Lennar associated with the construction of the houses.

A hearing was held on Lennar's Motion to Compel Arbitration and the circuit court denied their Motion to Compel Arbitration by the owners. The court did not address in its order motions to compel arbitration with Spring Grove Development nor the subcontractors.

Lennar filed a Motion to Alter or Amend which was denied pursuant to a Form 4 Order.

## **FACTS/PROCEDURAL HISTORY**

On December 12, 2014, the Owners filed a Complaint against Lennar, Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC based upon alleged construction defects in the houses. (R. 24). On February 17, 2016, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (R. 42). On June 1, 2015, Lennar filed a Motion to Compel Arbitration. (R. 257).

On November 23, 2015, the Owners filed their Amended complaint (the "Amended Complaint"). (R. 75). On November 25, 2015, Lennar timely filed its Answer to Plaintiff's Amended Complaint, Cross-Claims, and Third-Party Complaint. (R. 109).

On March 30, 2016, Lennar amended its Motion to Compel Arbitration requesting the circuit Court issue an order compelling the Owners to arbitration pursuant to the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds. (R. 262). Lennar's Amended Motion to Compel Arbitration (the "Motion") also requested the circuit court compel

DVS, Inc. filed a Memorandum in Opposition to the Amended Motion to Compel Arbitration filed May 6, 2016. (R. 2573).

A hearing on the Motions were held on April 11, 2016. (R. 203).

On September 19, 2016, the circuit court issued an order denying the Motion compelling the owners to arbitrate. The Circuit Court made the following findings: (1) the Purchase and Sale Agreements, the Lennar Warranty, the Covenants and the Deeds should be read together as a single arbitration provision; (2) the agreements are adhesion contracts; (3) the Lennar Warranty's terms are unconscionable; (4) the Lennar Warranty's terms are not severable from the arbitration provision; (5) the arbitration provisions are ambiguous because they contain references to both the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.* ("*SCUAA*"), and the *Federal Arbitration Act*, 9 U.S.C. § 1, *et seq.* ("*FAA*"); (6) the FAA does not apply to the Owners' Contracts with Lennar because they only involve intrastate commerce; and (7) the arbitration provisions fail to comply with the SCUAA's notice requirements. (R. 4). The circuit Court made no specific or separate findings regarding the arbitration agreements between either Lennar and the individual subcontractors.

On October 3, 2016, Lennar filed a motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, arguing the circuit court erred in:

1. Failing to follow the *Prima Paint* doctrine by relying on terms outside of each document's arbitration provision to find the provisions unconscionable;
2. Relying on terms in the Lennar Warranty to find the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds unconscionable;
3. Failing to give effect to the arbitration agreements; severability provisions;
4. Finding the Lennar Warranty's arbitration provision contains oppressive and one-sided terms;
5. Finding the arbitration provision are ambiguous;
6. Failing to find that regardless of any potential ambiguity the parties clearly demonstrated an intent to arbitrate any dispute arising from their transaction;
7. Failing to consider evidence that the parties' agreement for the construction and sale of a house involves interstate commerce;
8. Finding Lennar – a Delaware company – is organized in South Carolina;
9. Finding the Covenants Comply with the SCUAA but failing to compel arbitration under its terms; and
10. Ruling on the motion to compel the Subcontractors to arbitration without considering or analyzing of Lennar's agreements to arbitrate with the Subcontractors.

On October 16, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 order denying Lennar's Motion to Alter or Amend. (R. 3).

#### **STANDARD OF REVIEW**

Whether a claim is subject to arbitration is an issue for judicial determination and is subject to de novo review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379,

759 S.E.2d 727, 731 (2014). A circuit court's factual findings for which there is reasonable evidentiary support should not be reversed on appeal. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016), *reh'g denied* (Sept. 4, 2016) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)).

“[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Id.* (quoting *Green Tree Fin. Corp. – Ala v. Randolph*, 531 U.S. 79, 91 (2000)). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (internal quotation marks and citation omitted). In other words, there is a presumption in favor of the enforceability and application of arbitration agreements to disputes, and the party resisting arbitration bears the burden of proving an arbitration agreement does not apply. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013).

## ARGUMENT

### I. THE CIRCUIT DID NOT ERR IN FAILING TO ADDRESS LENNAR'S MOTION TO COMPEL ARBITRATION AS TO SUBCONTRACTORS IN LIGHT OF ITS FINDINGS REGARDING FAILURE OF THE ARBITRATION AGREEMENT AS TO THE PLAINTIFF.

Defendant DVS, Inc. believes the Court did not err in its findings. While DVS, Inc. denies that the base agreement is applicable to this project, assuming *arguendo* that DVS is bound by the arbitration provision contained in the Contractor Base Agreement, there is nevertheless an exception contained in the arbitration provision that, if “LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL

SHALL NOT APPLY[.]” The Plaintiff in the present lawsuit has prevailed in denying the Appellant a right to arbitration and to have this case heard by a jury. Since the Plaintiff was successful in opposing Lennar’s motion to compel arbitration, then Lennar would be required to litigate the Plaintiff’s claims against it before a jury and the cited exception to the arbitration provision would apply preventing DVS, Inc. from being required to submit to arbitration. Therefore, DVS, Inc. argues that, if the Plaintiff successfully opposes Lennar’s motion, then DVS, Inc. will also avoid arbitration by the terms of the disputed arbitration provision. DVS, Inc. is not subject to arbitration.

**II. IF THE CIRCUIT COURT ERRED IN FINDING THAT THE PLAINTIFF IS ENTITLED TO A JURY TRIAL, IT STILL MUST FIND NO ARBITRATION AGREEMENT BETWEEN APPELLANT AND DVS, INC.**

Assuming *arguendo*, the Appellate Court determines that the Appellant is entitled to compel arbitration with the Plaintiff, on remand the Court below must still find that there is no arbitration agreement between Appellant and DVS, Inc.

Under the Federal Arbitration Act as interpreted by the South Carolina Supreme Court, arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. Zabinski v. Bright Acres Associates, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). In the present case, the Contractor Base Agreement produced by Lennar that allegedly binds DVS to arbitration is dated June 26, 2007. However, DVS’ scope of work at The Abbey did not begin until 2011. The Contractor Base Agreement relied upon by Lennar does not specifically reference The Abbey or any other construction project in either the arbitration provision at issue or any other section of the contract. Rather, the Contractor Base Agreement is a general contract which by its own terms only becomes binding on a particular project when the requisite project-specific “Purchase Order” template referenced and attached as

“Schedule A” to the Contractor Base Agreement is executed. (R. 2579). No such agreement was executed.

Pursuant to the Federal Arbitration Act, challenges must be made to the arbitration provision itself and not to the contract generally because arbitration provisions are separable from the contracts in which they are included. South Carolina Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 562, 437 S.E.2d 22, 24 (1993). Because the arbitration provision at issue only applies to projects within the purview of the Contractor Base Agreement, it is necessary to analyze the scope of work provision under the Contractor Base Agreement to determine if indeed the arbitration provision binds DVS to arbitration for its work at The Abbey.

The specific “Purchase Order” referenced in the Contractor Base Agreement is not to be confused with a particular company’s purchase order or invoice sheet. The “Purchase Order” cited and attached as Schedule A to the Contractor Base Agreement is in fact a separate one-page contract which provides the project name, project address, project scope of work, and price/payment for the subcontractor for the project. (R 2586). It is clear from the scope of work provision in the Contractor Base Agreement that the Base Agreement only becomes binding on a particular project when the Schedule A “Purchase Order” contract form is issued.

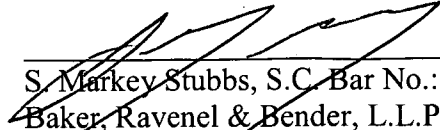
**SCOPE OF WORK:** Contractor shall provide labor, material, equipment or other services in such location(s) and under such terms as conditions as Lennar shall deem necessary (the “Work”) upon receipt of a Purchase Order from Lennar. When issued, the Purchase Order (see Schedule A) shall become part of this Agreement. The location(s) where the Work is to be performed shall be known as the job site or Project site and may be more fully described in Exhibit “A” to the Purchase Order. Unless otherwise provided, the term “Subcontractor” shall include all persons or entities of all tiers, whether contracting directly with Contractor, or any person acting by, through or under Contractor, that are providing labor, materials, equipment, supplies, and/or supervision to satisfy the requirement of Contractor’s Work.

Upon review of the cited "Purchase Order" template attached as Schedule A to the Contractor Base Agreement, the intent of the Contractor Base Agreement becomes evident: the Contractor Base Agreement contains all the basic material terms desired by Lennar for all of its projects and then the one-page "Purchase Order" agreement binds DVS to the terms of the Contractor Base Agreement for each subsequent project in which a Schedule A Purchase Order form is completed. However, Lennar did not issue the Schedule A Purchase Order form with DVS, Inc. as described in the Contractor Base Agreement with regards to The Abbey. Therefore, there is no contractual document binding DVS, Inc. to the terms of the Contractor Base Agreement with respect to The Abbey project in particular. Assuming the 2007 Contract could apply, it does not as no Purchase Order Form was issued.

#### **CONCLUSION**

If the Court upholds the denial of arbitration agreement as it applies to the owners, the claim for arbitration as applies to this subcontractor is rendered moot by the agreement relied upon by the Appellant. If the Court finds the arbitration agreement with the owners is enforceable, the case should be remanded to the trial court for determination of the enforceability of the base agreement in light of the failure of this project to be made a part of the base agreement or have a binding arbitration agreement. The Trial Court should be upheld and in the event the Trial Court is overturned, this case should be remanded for determination of the obligation of subcontractors under any alleged contracts.

Respectfully Submitted,



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S. Markey Stubbs, S.C. Bar No.: 7873  
Baker, Ravenel & Bender, L.L.P.  
3710 Landmark Drive, Suite 400  
Post Office Box 8057  
Columbia, South Carolina 29202  
Phone: (803) 799-9091 Facsimile: (803) 779-3423  
E-Mail: [mstubbs@brblegal.com](mailto:mstubbs@brblegal.com)  
File No.: 7603.455  
*Attorneys for Respondent DVS, Inc.*

Columbia, South Carolina  
August 22, 2017

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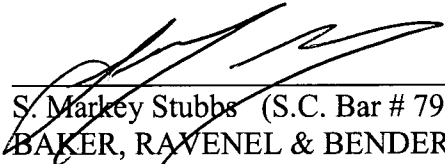
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**RESPONDENT DVS, INC.'S CERTIFICATE OF COUNSEL**

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The undersigned certified that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully Submitted,



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S. Markey Stubbs (S.C. Bar # 7973)  
BAKER, RAVENEL & BENDER, L.L.P.  
3710 Landmark Drive, Suite 400  
Post Office Box 8057  
Columbia, South Carolina 29202  
Phone: (803) 799-9091; Fax: (803) 779-3423  
[mstubbs@brblegal.com](mailto:mstubbs@brblegal.com); File No. 7603.455  
*Attorneys for Respondent DVS, Inc.*

August <sup>23</sup>~~22~~, 2017  
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